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2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202

202-955-3000
FAX 202-955-5564
www.hklaw.com

January 21, 2000

PATRICIA Y. LEE
202-457-7110

Internet Address:
plee@@hklaw.com

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Reply Comments of Local TV on Satellite, LLC
In the Matter of
Implementation of the Satellite Home
Viewer Improvement Act of 1999
Retransmission Consent Issues
(CS Docket No. 99-363)

Dear Ms. Salas:

Transmitted herewith, on behalf of Local TV on Satellite, LLC ("LTVS"), are an original and nine (9) copies of its Reply Comments in the above-referenced proceeding. A diskette copy of LTVS's Reply Comments is being simultaneously submitted under separate cover to Steven Broeckaert of the Cable Services Bureau and to the Commission's copy contractor, International Transcription Service.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If you have any questions please contact the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP

Patricia Y. Lee
Counsel for Local TV on Satellite, LLC

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home	)	CS Docket No. 99-363
Viewer Improvement Act of 1999	)	
	)	
Retransmission Consent Issues	)	

REPLY COMMENTS OF
LOCAL TV ON SATELLITE, LLC

LOCAL TV ON SATELLITE, LLC

Marvin Rosenberg
Patricia Y. Lee
David A. O'Connor
HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037-3202
202-955-3000

Its Counsel

January 21, 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

REPLY COMMENTS OF
LOCAL TV ON SATELLITE, LLC

1. Local TV on Satellite, LLC ("LTVS"), by its counsel, hereby submits its reply comments to the comments filed in response to the Commission's Notice of Proposed Rulemaking ("Notice") concerning the implementation of the exclusivity prohibition and "good faith" negotiation provisions of the Satellite Home Viewer Improvement Act of 1999 ("1999 SHVIA").

I. INTRODUCTION.

2. LTVS filed comments in this proceeding, in which it urged the Commission to adopt the Uniform Commercial Code ("UCC") definition of "good faith" and specific standards to measure a good faith negotiation in order to lend clarity to retransmission consent negotiations between satellite carriers and television broadcasters. LTVS also advocated an indefinite extension beyond 2006 of the current prohibition against exclusive contracts because the prohibition will continue to be necessary to foster competition and diversity in the multichannel video program distributor ("MVPD") market. Finally, LTVS recommended that the

Commission adopt specific enforcement procedures to ensure the prompt resolution of complaints involving the negotiation process. LTVS now submits the following in response to the other comments filed in this proceeding.

II. THE COMMENT PROCESS CONFIRMS THAT THE COMMISSION WAS CORRECT IN PROPOSING TO ADOPT AN EXPLICIT DEFINITION OF "GOOD FAITH" AS WELL AS SUBSTANTIVE AND PROCEDURAL RULES TO GOVERN THE RETRANSMISSION NEGOTIATION PROCESS.

3. Several comments agree with LTVS' proposal to adopt the UCC definition of "good faith" and, again, it so urges the Commission. *See* ALTV comments at 13-14; Walt Disney Company/ABC ("ABC") comments at 6. ALTV and ABC agree with LTVS that the Commission should adopt the UCC definition of the term "good faith" because it is well understood and commercially-accepted.

4. LTVS urges the Commission to adopt a specific standard to measure a good faith negotiation, in order to provide a basic framework for the retransmission negotiation process. LTVS agrees with the Commission and various comments, including those filed by CBS, ABC, and DirecTV, that such rules are necessary to lend clarity to and facilitate the negotiation process. *See* CBS comments at 10-14; ABC comments at 4-8, DirecTV comments at 7-11.[1] Far from being intrusive or

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[1] LTVS strongly disagrees with the comments, and in particular those of NBC, that argue for no guidance whatsoever in the negotiation process. NBC argues that broadcasters have every incentive to enter into retransmission agreements and therefore negotiation guidelines are unnecessary. NBC comments at 3-4. In support of this claim, NBC notes that three of the four major networks (NBC, ABC, and Fox) have already entered into agreements with DirecTV for the retransmission of their respective owned and operated television stations. NBC further notes that Echostar has an agreement with Fox for the retransmission of its owned and operated television stations.

These facts illustrate precisely why the Commission should adopt negotiation guidelines. DirecTV has been unable, up to this point, to negotiate retransmission agreements with all of the major networks. Indeed, Echostar has been unable to negotiate retransmission agreements with any attempting to dictate the substantive terms of retransmission agreements, the proposed rules, which are properly limited in their reach, seek only to aid satellite carriers and broadcast television stations during the negotiation process.

5. Several comments agree with LTVS' proposal to adopt good faith negotiation requirements similar to those found in the area of labor law. *See* CBS comments at 10-14; ABC comments at 4-8; DirecTV comments at 7-11. LTVS agrees with ABC that the Commission should adopt rules that require parties to "come to the table with a sincere desire to reach agreement, and not simply engage in 'sham bargaining.'" ABC comments at 7. In addition, LTVS agrees with ABC that: (1) "conduct that is tantamount to a refusal to bargain, such as bypassing completely the negotiating process, refusing to confer at reasonable times or refusing to execute a written contract once an agreement has been made" or (2) "refusing to vest a representative with the authorization to enter into an agreement" would be evidence of a violation of the good faith negotiation requirement. *Id.*

6. In addition, LTVS agrees with BellSouth and U S West that any attempt by a broadcaster to impose a non-optional tying arrangement on a satellite carrier in exchange for retransmission consent would be deemed a *per se* violation of the good faith negotiation requirement. *See* BellSouth comments at 13; U S West

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network broadcaster other than Fox. *See* Echostar comments at 8. Without Commission guidelines that will facilitate full must-carry, satellite customers will continue to receive a patchwork of local broadcast stations, which would defeat the very purpose of the 1999 SHVIA. Equal footing requires all broadcasters to seek to reach retransmission agreements with all satellite carriers. Anything short of this congressional goal will lead to consumer confusion and frustration. The Commission should reject arguments that market forces will sufficiently counteract the unequal footing on which comments at 5-6. For example, under such a tying arrangement, a broadcaster potentially could withhold retransmission consent unless the satellite carrier agrees to carry additional programming services in which the broadcaster has a management or economic interest. This type of tying arrangement is inherently anticompetitive and should be expressly prohibited by the Commission's rules. We agree with BellSouth that the prohibition on tying arrangements "should not be the exclusive province of the Department of Justice," but that the Commission has an obligation to protect the public interest from such anticompetitive behavior. BellSouth comments at 14 n.22.

7. Finally, the diversity of the comments shows that it is very difficult to define the term "competitive marketplace considerations." This does not mean, however, that the Commission should not provide guidance to satellite carriers and broadcasters during the negotiation process. LTVS supports a general standard of "competitive marketplace considerations" that would provide the parties with clarity during the negotiation process, while not frustrating the pro-competitive objectives of the statute. LTVS agrees with BellSouth that differential terms should be deemed a *per se* violation of the "good faith" requirement unless the broadcaster can show that the differences are cost-justified. BellSouth comments at 17.

8. LTVS disagrees with NBC that different retransmission price terms (*i.e.*, wholesale prices) that are based on different retail prices is the type of

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satellite carriers currently find themselves. Specific Commission guidelines are necessary to ensure that the underlying goals of the 1999 SHVIA are realized and to facilitate full must-carry.

condition that is cost-justified. *See* NBC comments at 9. NBC's comments illustrate why Commission guidance is necessary.

9. NBC competes at the wholesale level, yet it argues that competition at the retail level would require it to charge differential retransmission prices to account for competition it does not face. However, only competition at the wholesale level is relevant to its retransmission pricing decision. The Commission should not consider this "condition" to be commercially reasonable in any retransmission negotiation.

III. THE COMMISSION SHOULD EXTEND THE EXCLUSIVITY PROHIBITION INDEFINITELY BEYOND JANUARY 1, 2006.

10. LTVS reiterates that the Commission should not abdicate its jurisdiction over exclusive contracts commencing on or after January 1, 2006. LTVS disagrees with the comments that generally allege that the 2006 date is tantamount to a sunset provision. *See, e.g.*, CBS comments at 15; Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations ("Joint Comments") at 26. Rather, LTVS joins BellSouth, the Wireless Communications Association International ("WCA"), U S West, and the American Cable Association ("ACA") in urging the Commission to exercise its general powers by extending the exclusivity prohibition indefinitely beyond January 1, 2006. *See* BellSouth comments at 18-22; WCA comments at 5-11; U S West comments at 6-8; ACA comments at 15-16. An indefinite extension is justified because the prohibition will continue to be necessary to foster competition and diversity in the MVPD market, which is the very purpose of the 1999 SHVIA.

11. Curiously, after stating that broadcasters seek maximum distribution of their signals, the Joint Comments argue that the Commission should permit broadcasters to enter into exclusive programming agreements which take effect after 2006. LTVS opposes allowing program exclusivity after 2006, and urges the Commission to take a closer look at the motivation behind program exclusivity and the discriminatory effects of this type of agreement.

12. Presumably, under such an arrangement a network and a large station group could enter into an arrangement whereby a very attractive program would be available only over-the-air in the markets in which the network and the station group own and operate television stations and from a particular satellite carrier. The Commission should closely analyze the following adverse effects of program exclusivity.

13. First, such an agreement appears to undermine the broadcasters' other argument that no negotiation guidelines are necessary because broadcasters have every incentive to enter into retransmission consent agreements. *See* Joint Comments at 15-16; NBC comments at 3-4; ABC comments at 3-4; ALTV comments at 9-10. NBC explains "[a] television station wants to be carried on as many competing MVPD systems as possible, thereby ensuring the largest possible audience for [its] shows and increasing advertising revenue." NBC comments at 3; *accord* ABC comments at 3-4; ALTV comments at 9-10; Joint Comments at 15-16. The Joint Comments' push for program exclusivity, however, shows that

broadcasters do not have "every" incentive to enter into retransmission agreements with every MVPD.

14. Second, exclusive program arrangements could create a number of discriminatory "have" versus "have not" situations, including those between direct broadcast satellite ("DBS") distributors, between large- and small-market television stations, and between affiliates within a particular network.

15. Finally, Congress has now allowed consumers to receive their DBS programming and all of their local broadcast programming through their DBS provider. If the Commission permits broadcasters to enter into exclusive program contracts, no single DBS provider may be able to provide all of the available broadcast programming in the local market. This would eviscerate the very purpose of the 1999 SHVIA – to place DBS on an equal footing with cable in terms of broadcast programming. For at least these three reasons, the Commission should reject the Joint Comments' invitation to permit exclusive program agreements after 2006.

IV. LTVS SUPPORTS THE PROMPT AND FAIR RESOLUTION OF COMPLAINTS.

16. LTVS reiterates its support for the prompt resolution of complaints through effective Commission enforcement procedures. *Accord* DirecTV comments at 16-17; Echostar comments at 24. LTVS would expect, however, that rarely would the parties have to resort to such proceedings if Commission guidelines are adopted, given the mutual benefit of retransmission for both satellite carriers and broadcasters.

17. LTVS agrees with ABC that the Commission should adopt its own procedures for the resolution of complaints rather than rely on alternative dispute resolution. *See* ABC comments at 16-17. A Commission process could and should be carefully tailored to reflect the pro-competitive goals of the 1999 SHVIA by ensuring the expeditious resolution of disputes.

V. OTHER ISSUES.

A. LTVS Does Not Object to Placing the Duty to Negotiate in Good Faith on Both Parties.

18. ABC, ALTV, and others argue that the duty to negotiate in good faith should apply equally to satellite carriers and broadcasters. *See* ABC comments at 8; ALTV comments at 18-19; Joint Comments at 17-18. LTVS does not object to such a rule.

B. Joint Retransmission Agreements With Respect to Carriage of A Station's Analog and Digital Signals Are Not An Issue for LTVS.

19. LTVS acknowledges that broadcasters may seek to negotiate a joint retransmission agreement for the carriage of their analog and digital signals during the transition period in which they are converting to digital signals. This is not an issue for LTVS because its business plan provides for the technical capability to carry the full digital signals (19.4 Mbps) of local television stations.

C. The Exclusivity Prohibition and Good Faith Negotiation Rules Should Apply Retroactively.

20. In its comments, Fox suggests that the rules adopted by the Commission in this proceeding "should be applied only prospectively to

retransmission consent negotiations that occur after the rules' effective date." Fox comments at 3. LTVS urges the Commission to reject this suggestion and to apply the rules it ultimately adopts retroactively to ensure that the pro-competitive goals underlying the 1999 SHVIA are realized.

21. The Supreme Court has held that retroactivity is justified if necessary to the success of a statute aimed at an important social policy and where strong public interest concerns are at issue. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). Here, the purpose of the 1999 SHVIA is to place satellite carriers on equal footing with local cable operators, thus providing consumers with more and better choices in selecting a MVPD. The Commission has recognized the strong public interest in implementing the provisions of the 1999 SHVIA. Indeed, the Commission explicitly stated in the Notice that it intended to conclude this rulemaking well ahead of statutory deadlines. This clearly evinces the strong public interest in, and the social importance of, this legislation.

22. Accordingly, to ensure that no exclusive agreements have been reached prior to the implementation of the Commission's rules and that all negotiations between broadcasters and satellite carriers have been conducted in good faith, the Commission should apply the rules it ultimately adopts retroactively.

VI. CONCLUSION.

23. For all these reasons, and in order to fulfill the pro-competitive goals underlying the 1999 SHVIA, the Commission should adopt the UCC definition of the term "good faith," adopt a specific standard on what constitutes a good faith

negotiation, extend the exclusive contracts prohibition indefinitely beyond 2006, and enact specific enforcement procedures to ensure the prompt resolution of complaints.

Respectfully submitted,

LOCAL TV ON SATELLITE, LLC

Marvin Rosenberg
Patricia Y. Lee
David A. O'Connor
HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037-3202
202-955-3000

Its Counsel

Dated: January 21, 2000

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